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MOHAMED AZAHARI MATIASIN

v.

GBB NANDY & ORS

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COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: S-02-3304-2010]

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26 JUNE 2013

LEGAL PROFESSION: *Practice of law - Right of audience - Representation by Kuala Lumpur lawyer in arbitration proceedings in Sabah - Whether s. 8(1) of Advocates Ordinance 1953 (Sabah Cap. 2)*

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excludes representation by foreign lawyers - Whether only members of Sabah Bar have exclusive right of representation at arbitration proceedings in Sabah - Advocates Ordinance 1953 (Sabah Cap. 2), s. 2

STATUTORY INTERPRETATION: *Construction of statute - Aids to construction - "exclusive right to practice in Sabah" - Whether s. 8(1) of Advocates Ordinance 1953 (Sabah Cap. 2) excludes representation by foreign lawyers other than members of Sabah Bar - Whether advocates of Sabah denied exclusive right of representation at arbitration proceedings in Sabah - Advocates Ordinance 1953 (Sabah Cap. 2), s. 2*

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The appellant, a Sabah advocate practising in Kota Kinabalu, represented Borneo Samudera in an arbitration proceedings between one Samsuri bin Baharuddin and others ('the claimants') and Borneo Samudera. Borneo Samudera intended to appoint an advocate and solicitor from Kuala Lumpur ('Mr Lam') to represent it as co-counsel to the appellant. However, the claimants objected, on the ground that Mr Lam was not an advocate in Sabah and as such, by reason of s. 8(1) of the Advocates Ordinance 1953 (Sabah Cap. 2) ('Advocates Ordinance'), had no right to represent Borneo Samudera at the arbitration proceedings. The appellant therefore filed an application for declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance are not prohibited from representing parties to arbitration proceedings in Sabah. The High Court dismissed the appellant's application and held that the phrase "exclusive right to

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practice in Sabah" in s. 8 of the Advocates Ordinance meant that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both "in and outside" courts and a non-member of the Sabah Bar must apply for an *ad hoc* admission to the local bar if he wishes to carry out the works. Hence, this appeal by the appellant, who submitted that the words "to practice in Sabah" is governed by the interpretation section in s. 2 of the Advocates Ordinance and therefore, the Sabah advocates have no exclusive right of representation at arbitration proceedings in the State of Sabah.

Held (allowing appeal with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) There is nothing in the Advocates Ordinance that states that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the State of Sabah. (para 8)

(2) By reason of the definition of the words "to practice in Sabah" in s. 2(1) of the Advocates Ordinance, the exclusivity of the right to practice for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, peguam Sabah yang beramal di Kota Kinabalu, mewakili Borneo Samudera dalam prosiding timbang tara antara Samsuri bin Baharuddin dan lain-lain ('penuntut-penuntut') dan Borneo Samudera. Borneo Samudera berniat melantik seorang peguambela dan peguamcara dari Kuala Lumpur ('Encik Lam') untuk mewakilinya sebagai peguam bersama perayu. Walau bagaimanapun, penuntut-penuntut membantah, atas alasan bahawa Encik Lam bukan peguam Sabah dan dengan itu, berikutan s. 8 Ordinan Peguam Bela (Sabah Bab 2) ('Ordinan Peguam Bela') tidak mempunyai hak untuk mewakili Borneo Samudera dalam prosiding

timbang tara tersebut. Perayu, oleh itu, memfailkan permohonan untuk deklarasi bahawa peguam-peguam luar yang bukan peguam dalam maksud Ordinan Peguam Bela tidak dilarang daripada mewakili pihak-pihak dalam prosiding timbang tara di Sabah. Mahkamah Tinggi menolak permohonan perayu dan memutuskan bahawa frasa "hak eksklusif untuk beramal di Sabah" dalam s. 8 Ordinan Peguam Bela bermaksud bahawa peguam-peguam yang telah diterima masuk ke Majlis Peguam Sabah mempunyai hak eksklusif untuk mengamal undang-undang di "dalam dan luar" mahkamah dan yang bukan ahli Majlis Peguam Sabah perlu memohon kebenaran *ad hoc* majlis peguam tempatan jika beliau ingin membuat kerja-kerja tersebut. Maka, rayuan ini oleh perayu, yang menghujahkan bahawa perkataan-perkataan "untuk beramal di Sabah" tertakluk kepada pentafsiran seksyen dalam s. 2 Ordinan Peguam Bela dan dengan itu, peguam Sabah tidak mempunyai hak eksklusif untuk mewakili dalam prosiding timbang tara di Negeri Sabah.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Tidak ada apa-apa dalam Ordinan Peguam Bela yang menyatakan bahawa peguam yang diterima masuk di Sabah mempunyai hak eksklusif untuk mewakili pihak-pihak dalam prosiding timbang tara di Negeri Sabah.

(2) Berdasarkan kepada definisi perkataan-perkataan "untuk beramal di Sabah" dalam s. 2(1) Ordinan Peguam Bela, keeksklusifan hak beramal bagi peguam di Sabah terikat dengan hak eksklusif untuk beramal sebagai peguambela dan peguamcara di England; dan oleh sebab peguambela dan peguamcara di England tidak mempunyai hak perwakilan eksklusif dalam prosiding timbang tara di England, dengan itu, peguam Sabah juga tidak mempunyai hak perwakilan eksklusif dalam prosiding timbang tara di Negeri Sabah.

Case(s) referred to:

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC ***(dist)***

Zublin Muhibbah Joint Venture v. Government of Malaysia [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371 HC ***(dist)***

Legislation referred to:
Advocates Ordinance 1953 (Sabah Cap. 2), ss. 2(1), 8(1)
Legal Profession Act 1976, ss. 35(1), 36(1)

Arbitration Act 1996 [UK], s. 36

For the appellant - Ho Kin Kong; M/s Ho Chong Yong
For the 1st respondent - John Sikayun; M/s Luping & Co
For the 2nd respondent - Alex Decena (Christine Liew Chin Jin with him); M/s CJ Liew & Co

[Editor's note: For the High Court judgment, please see In Re Mohamed Azahari Matiasin (Applicant) [2011] 2 CLJ 630.]

Reported by S Barathi

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Kota Kinabalu dismissing the appellant's application for a declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) are not prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah.

[2] On 24 September 2012, after hearing submissions, we, unanimously, allowed the appeal with costs (costs is only ordered against the second respondent).

[3] We now give our grounds.

[4] There is an arbitration proceedings in Kota Kinabalu that is still ongoing. The parties in the arbitration proceedings are one Encik Samsuri bin Baharuddin and 813 others on one side, as the claimants, and a company called 'Borneo Samudera Sdn Bhd' ('Borneo Samudera'), on the other side, as the respondent. The appellant before us in this appeal, Encik Mohamed Azahari, is a Sabah advocate practising in Kota Kinabalu; and is the counsel for Borneo Samudera at the arbitration proceeding. Borneo Samudera, however, intends to appoint one Mr Lam Ko Luen, an advocate and solicitor from Kuala Lumpur, to represent it as co-counsel to Encik Mohamed Azahari in the arbitration proceedings. But the claimants' solicitors, by notice, objected to

Borneo Samudera engaging Mr Lam Ko Luen as co-counsel at the arbitration proceedings, on the ground that Mr Lam is not an advocates in Sabah and as such by reason of s. 8(1) of the Advocates Ordinance 1953 (Sabah Cap. 2) has no right to represent Borneo Samudera at the arbitration proceedings.

[5] This prompted the appellant to file an originating summons application seeking for a declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap. 2) are not prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah.

[6] The learned High Court Judge of Kota Kinabalu dismissed the appellant's application.

[7] The reason given by the learned High Court Judge for dismissing the appellant's application is as follows:

> Reverting to the issue at hand, I must follow the established rule of interpreting statutes and that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute. Applying that trite principle to words employed in s. 8 of the Ordinance, I have no hesitation in holding and do hold that the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. In short, if someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for *ad hoc* admission to the local Bar.

[8] In our judgment, this appeal should be allowed. In our view, there is nothing in the Sabah Advocates Ordinance 1953 (Cap. 2) that states that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the State of Sabah.

[9] The respondents, however, submit that advocates admitted in Sabah have the exclusive right of representation in arbitration proceedings in Sabah by reason of s. 8(1) of the Advocates Ordinance. This provision reads:

> Right to practise in Sabah
>
> 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High

> Court and in all courts in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation ...

[10] The respondents place emphasis on the words '... advocates shall have the exclusive right to practise in Sabah ...' in sub-s. (1) of s. 8. The respondents contend that the words 'to practise' must be interpreted to mean to practise as a lawyer anywhere in Sabah, whether in courts or outside courts, such as at arbitration proceedings. The respondents argue that since Mr Lam is a lawyer, it follows that when he represents a party at an arbitration proceedings he is in fact practising as an advocate in Sabah. That he cannot legally do; unless he has been admitted as an advocate in Sabah.

[11] For their argument, the respondents rely on the Federal Court case of *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii* [2009] 4 CLJ 449.

[12] The appellant, on the other hand, submits that the meaning of the words 'to practise in Sabah' is governed by the interpretation section in s. 2 of the Advocates Ordinance. This section defines the words 'to practise in Sabah' in the following manner:

> 'to practise in Sabah' means to perform in Sabah:
>
> (a) any of the functions which in England may be performed by a member of the Bar as such;
>
> (b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;

[13] The appellant submits that by reason of the above definition, the exclusive right of advocates in Sabah to practise is linked to the exclusivity rights of barristers and solicitors in England. The appellant argues that if we were to read s. 8(1) of the Advocates Ordinance with the definition of 'to practise in Sabah' as prescribed by s. 2(1) of the same Ordinance, then it means this: if in England, by law, barristers and solicitors have the exclusive right of representation at arbitration proceedings, only then would advocates in Sabah enjoy a similar exclusive right in respect of arbitration proceedings in Sabah. Otherwise, advocates in Sabah

do not enjoy exclusive right of representation in arbitration proceedings in Sabah. And the appellant points out that in England barristers and solicitors have no exclusive right to represent parties at arbitration proceedings (this fact is not disputed; and is accepted by the learned High Court Judge). The appellant refers to s. 36 of the UK Arbitration Act 1996 that states:

> 36. Legal or other representation
>
> Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

[14] Thus the appellant contends that it would follow that in Sabah advocates have no exclusive right of representation at arbitration proceedings in the State of Sabah.

[15] The appellant also relies on *Zublin Muhibbah Joint Venture v. Government of Malaysia* [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371; [1990] 3 MLJ 125. This case concerns arbitration proceedings in West Malaysia. It also concerns ss. 35(1) and 36(1) of the Legal Profession Act 1976. In this case, the court held that in West Malaysia a person representing a party in an arbitration proceedings need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and that the Legal Profession Act has no application to an arbitration proceedings in West Malaysia.

[16] In the case that is now before us, at the High Court, the learned judge ruled that the meaning given to the words 'to practise in Sabah' by s. 2 of the Advocates Ordinance does not assist the appellant; it has no bearing on the issue before the court. This is what the learned judge in his grounds of judgment said:

> In respect of the reliance on (sic) sec. (2)(1)(a) and (b) of the Ordinance, it is with respect without merit as the non exclusivity of barristers' and solicitors' appearance in arbitration proceedings in England is not relevant to the issue at hand which concerns the exclusivity of legal practice in Sabah. The fact that non lawyers are allowed to appear in arbitration in England in no way has any bearing on what the words 'practise in Sabah' mean.

[17] The learned High Court Judge further held that *Zublin* can be distinguished from the present case in that the provisions of the Legal Profession Act of West Malaysia are different from the Advocates Ordinance of Sabah. In the Legal Profession Act of West Malaysia, s. 35(1) provides:

> **35. Right of Advocate and Solicitor**
>
> (1) Any advocate and solicitor shall, subject to this act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia …;

whereas s. 8(1) of the Sabah Advocates Ordinance provides:

> 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah …

[18] With respect, whilst we agree with the learned High Court Judge that on the facts *Zublin* can be distinguished (and, therefore, *Zublin* is not relevant for the purpose of the issue at hand), we, however, disagree with the learned judge on his understanding on the implication of the definition of the words 'to practise in Sabah' as prescribed by s. 2(1) of the Sabah Advocates Ordinance in interpreting s. 8(1) of the said Ordinance. We agree with the submission of the appellant that by reason of the definition of the words 'to practise in Sabah' in s. 2(1) of the Advocates Ordinance, the exclusivity of the right to practice for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah.

[19] In our view, *Datuk Hj Mohammad Tufail Mahmud* does not in anyway support the position taken by the respondents. There, the facts and issues were different.

[20] The declaration sought should be granted.